COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

JAMES O. WALLACE,
Petitioner,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

No. 280.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

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INDEX.

	Page
I. Statement of the Case	2
II. Reply to Reasons for Granting Writ	2
Conclusion	9
Appendix A—Opinion of Supreme Court of Mississippi	11

Cases Cited.

Atlantic Coastline Railroad Co. v. Craven, 185 Fed. 2d 176	5
Chicago, M., St. P. & T. Railroad Co. v. Kane, 33 Fed. 2d 866	5
Garcia v. Atchison, Topeka and Santa Fe Ry. Co., 66 N. M. 339, 347 P. 2d 1095, Cert. denied 80 S. Ct. 1077	9
Gulf, M. & N. Railroad Co. v. Myer, 143 Miss. 555, 110 So. 444	4
Healy v. Pennsylvania Railroad Co., 184 Fed. 2d 209	5
James E. Hill v. Gulf, Mobile & Ohio Railroad Co., 120 So. 2d 151	4, 7
Mostyn v. Delaware, L. & W. Railroad Co., 160 Fed. 2d 15	5
North Carolina Railroad Co. v. Zachery, 232 U. S. 248	6
Quirk v. New York, C. & St. L. R. Company, 180 Fed. 2d 97	4

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BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

The writ of certiorari applied for in this case should not be granted for the following reasons:

(1) The Federal question involved has been determined heretofore by this court.

(2) The state court has not decided this case in conflict with the applicable decisions of this court, but to the contrary has decided it in accord with such decisions.

(3) The review of the matter by this court would amount to nothing more than a second appeal for the petitioner and would have no special and important significance.

I.

STATEMENT OF THE CASE.

We do not think the statement of the case contained in the brief of petitioner presents a full and well-rounded statement of the facts. It fails to state the important facts as shown by the evidence in the case that at the time of the injury complained of, the plaintiff had completed his work with the railroad, had been off duty for more than two hours, had gone off of the railroad premises, and was undertaking to come back on the railroad premises on a mission of his own. The opinion of the Supreme Court of Mississippi contains a good statement of the facts in this case and we refer to it instead of undertaking to make a statement for the respondent. Copy of the opinion of the Supreme Court of Mississippi will be found in Appendix A to this brief.

II.

REPLY TO REASONS FOR GRANTING WRIT.

First: Petitioner's complaint is that the court denied the right to a trial by jury which was provided by the Federal Employer's Liability Act. The act gives the right of trial by jury on issues of negligence and the court has held that where, from the facts or from a controversy as to facts, fair minded men may reach different conclusions as to whether or not the acts constituted negligence, the issue must be submitted to a jury; but the court has also without exception held that where there is no basis for the finding of negligence, the court will not submit the matter to a jury.

Both of the lower courts in this case have held that there was no basis for the finding of negligence. The claim of negligence in this case is not based on some active force

exerted or controlled by the defendant from which the injury was suffered by the plaintiff. His claim is based on failure to do what he contends the defendant was under obligation to do, and from this claims negligence.

The negligence claimed by him is failure to furnish a safe place in which to work. The courts below held that the plaintiff was not doing any work for the defendant at the time of the injury and therefore the defendant was under no obligation to provide him a safe place in which to work. The plaintiff stated, on page 73 of the record, numbered according to the Supreme Court of Mississippi, as follows:

> "I was off duty when this accident occurred. The accident occurred about 12:15 P. M., or just after noon."

His testimony was that he had signed the register and went off duty about 9:30 to 10:00 o'clock, went off of the railroad premises to a private hotel and engaged a room, ate his breakfast, sat around and read the newspaper and after about two hours undertook to go back on the railroad premises on a mission of his own, to wit, that of shaving in the wash room on the railroad yards.

The court below did not deny the plaintiff the right of trial by jury to determine the negligence of the defendant, but held that no basis for negligence had been shown in that the plaintiff's own evidence showed that he was not on duty and was under no employment whereby the defendant was under any obligation to provide for him a reasonably safe place in which to work. Failing to show the obligation, he failed to establish a basis for negligence which would have to arise from such obligation. There was no claim of any defect in the cars, tra' s or equipment of the defendant through which the plaintiff undertook to pass and in doing which he fell and suffered his injury. His sole basis for claim is that the defendant was

negligent in failing to furnish him a safe place in which to work at a time when he was under no duty to work and had no work to perform.

Petitioner contended in the court below that he was deprived of his right because the court refused to submit to the jury the question of whether or not he was employed at the time without which the charge of negligence could not be sustained. The court below held that when the facts were undisputed, it was a question of law as to whether or not he was employed and not a matter for decision by the jury, or one as to which juries could reach different conclusions. This decision was supported by authority from the Federal courts, to wit:

> "Where there was no dispute as to any material fact in action under Federal Employer's Liability Act, whether employee at time of accident was then engaged in his employment with defendant railroad was a question of law. Federal Employer's Liability Act, Sec. 1, et seq., 45 USCA, Sec. 51, et seq."
>
> **Quirk v. New York C. & St. L. R. Co., 189 Fed. 2d 97.**

There was, therefore, no denial of a right to trial by jury to petitioner.

Petitioner complains that the Supreme Court of Mississippi has always given a restricted interpretation of the coverage of the Federal Employer's Liability Act as to engagement in interstate commerce and cites two cases, **Gulf, M. & N. R. R. Co. v. Myer, 143 Miss. 555, 110 So. 444**, and **James E. Hill v. Gulf, Mobile & Ohio R. R. Co., 120 So. 2d 151**, decided by the Supreme Court of Mississippi, neither of which has any bearing on this case.

In the Myer case, 110 So. 444, prior to the amendment of 1939, the court held that that case was not covered by the Federal Employer's Liability Act, being urged so to

do by the plaintiff himself in order to escape the bar of the statute of limitations under the Federal Employer's Liability Act. The Hill case, supra, was decided since this instant case and whether right or wrong could have no bearing on the decision of this case prior thereto.

Second: Petitioner claims in this ground that the decision of the Supreme Court of Mississippi is contrary to the opinions of the various United States Courts of Appeal, but fails to cite any cases to which it is contrary. The Supreme Court of Mississippi distinguished the case of **Atlantic Coastline Railroad Company v. Craven, 185 Fed. 2d 176,** and showed that in that case the employee was still in the discharge of duty. In the case of **Healy v. Pennsylvania Railroad Company, 184 Fed. 2d 209,** cited in this section, the facts in that case show that it was entirely unlike the present case in that there the employee had been transported to the place of the accident by the defendant and was being paid for his time and was engaged in business to which he was directed by the railroad company, and the negligence alleged is from being struck by a train and not from failure to furnish a safe place to work. The court held there was no negligence shown.

In the case of **Chicago, M. St. P. & T. Railroad Company v. Kane, 33 Fed. 2d 866,** the employee was injured in the railroad yards coming from quarters in which he had been housed by the railroad company and was crossing the railroad yards and struck by an engine of the railroad company. This case was distinguished by the Supreme Court of Mississippi in that it was one in which the employee was housed on premises furnished by the railroad company and in which case the court said the relationship continued to exist.

Likewise, the court distinguished the case of **Mostyn v. Delaware L. & W. Railroad Company, 160 Fed. 2d 15,** and

placed it in the category of those cases in which the railroad company provided quarters for the employees and in which the court said it is no longer doubted that, where such quarters are provided, the employee is under the protection of the law while staying in such quarters.

Third: Petitioner sets out that the decision in this case creates a conflict between it and decisions of the United States Supreme Court but fails to set out any of the decisions with which he claims it is in conflict. He cites the case of **North Carolina Railroad Company v. Zachery, 232 U. S. 348,** but fails to show any conflict. The Supreme Court of Mississippi referred to this case in its opinion as showing that its decision was in accord with that case. Petitioner conceded that the two cases cited on this ground were of dissimilar facts and claims that there should be a liberal interpretation of the law to include employees under the act. That the Supreme Court of Mississippi did give liberal interpretation of the act is shown by the language of the court in its opinion as follows:

> "It is no longer doubted that the Employers Liability Act extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto. Thus, an employee is working in commerce while going to and from his actual place of work after reporting to duty. Lukon v. Pennsylvania R. Co., 131 Fed. 2d 327. And the act covers temporary departure from his line or course of duty as where a fireman, after oiling, firing and preparing his engine for an interstate journey temporarily left his engine to go to his nearby boarding house and was struck while on the railroad premises. North Carolina R. R. Co. v. Zachery, 232 U. S. 248." (Opinion Appendix A)

While the court has placed under coverage of the act the time required by the employee to leave the premises for his home, or place of abode, or temporary absence, while

in line of duty in employment, in this case, the petitioner had left the premises of the defendant, signed out as off duty as an employee, taken up his quarters in a private place off of the premises of the railroad company, eaten his breakfast, and spent two hours, or more, reading the paper and sitting around, during all of which time, according to his contention, the petitioner would be in the service of the defendant and under the act, although he had been discharged from duty and left the premises of the defendant and was not subject to call for eight hours.

Fourth: Under this ground, petitioner claims the writ of certiorari should be granted because there has arisen through the years a conflict of decisions of the highest courts of the states on the Federal question involved and cites in this section only decisions from the Supreme Courts of states. According to the rules of this court, the writ of certiorari is not a matter of right but of sound discretion and will be granted only where there are special and important reasons therefor. We do not conceive that the fact there are differences between the decisions of the various states constitutes special and important reasons for this court to review this case. There have always been differences between the decisions of the various states on questions of law, but it is not the function of this court to reconcile the differences of the state courts. It is only when the decisions of the state courts are in conflict with the decisions of this court that the matter may be considered. We do not think it is important that we discuss the state court decisions cited under this section of the petition other than the case of **Hill v. Gulf, Mobile & Ohio Railroad Company, 120 So. 2d 157**, decided by the Supreme Court of Mississippi after the decision by it of the case now before this court for certiorari. If that case was decided erroneously, petitioner's remedy is application for certiorari in that case and not undertaking to get a collateral review of it through this case. It is not a case which is in conflict with the decisions of the court in this case, but in

accord with it, and in fact, the court cited this case as authority in that case. In that case, there was a claim of liability for failure to provide a safe place to work. The court held that such ground was not tenable because neither of the parties involved were employed by the railroad company at the time in question. This fourth ground is without the support of any authority upon which to base this contention. It rests on a misconception of the basis of liability in this case, if there be any. It is his contention that the Federal Employer's Liability Act should be the law to govern a case of this kind. The court did not deny to petitioner any benefits under the Federal Employer's Liability Act but tried it as if the law of that act governed. The basis of all liability is negligence and what is negligence under the Federal Employer's Liability Act is what is negligence under the common law except in certain specified cases in regard to safety appliances, etc., none of which are involved in this case. Petitioner says he bases his claim on failure of the defendant to furnish a safe place to work. What the court decided was that he was not employed by the defendant, had no work to do, no duty to perform and therefore, there was no obligation on the part of the defendant to furnish a safe place to work when there was no work. It is admitted by all parties that he was off duty at the time. He stated that he would have no further duties until he was called back to take another train. There is no duty to furnish a safe place to work when there is no work to be done and, therefore, no need of a safe place. Petitioner was given full benefit of the Federal Employer's Liability Act in both the trial court and in the Supreme Court. Both courts considered the facts on the basis of the Federal Employer's Liability Act and the liability imposed by it. Both courts tried the case as it under the Federal Employer's Liability Act and gave petitioner benefit of all that might be had under it and his case failed to meet the test of liability because there was no obligation of the defendant

ant to furnish him a safe place in which to work when he was not on duty and had no work to do.

Fifth: This ground presents no matter of law and is one of expediency and could be more properly presented before Congress if the relief he asks should be granted than before this court which acts according to the law as written. The statements made do not present the situation in accordance with the record in this case. Nothing in this ground gives any support for the foundation of this case which he states in his brief was failure to furnish a safe place in which to work.

Sixth: This contention is untenable for the reason that the court has held that certiorari will not be granted merely to give relief to the individual concerned. This contention is that he will lose the damages which he has suffered. This is purely a personal matter, does not furnish special and important reasons and concerns only the petitioner himself and the court will not grant certiorari according to the rules merely for the relief of the litigant.

CONCLUSION.

The granting of certiorari and review of this case by this court would amount only to a second hearing on the facts of the case and would add nothing to the applicable law. It would involve no question peculiar to Federal law. Any decision on the law different from that of the Supreme Court of Mississippi would be in conflict with the former and established decisions of this court. The case of Garcia v. Atchison, Topeka and Santa Fe Ry. Co., 66 N. M. 329, 347 P. 2d 1065, in the Supreme Court of New Mexico, was very similar to the instant case, and was decided against the employee on directed verdict. This Court denied certiorari in that case on [illegible], 1977. There are no special and important reasons for granting the writ.

Wherefore, respondent respectfully submits that petitioner is not entitled to have this cause reviewed again.

and that his petition for writ of certiorari to the Supreme Court of Mississippi should be denied.

Respectfully submitted,

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Certificate of Proof of Service.

I, C. R. Bolton, attorney for the respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I received copy of the petition for writ of certiorari on July 26, 1960, and I am this day serving copies of the above and foregoing brief in opposition to the said petition by mailing same in properly addressed envelopes with first class postage prepaid to Honorable Frank E. Everett, Jr., Counsel for Petitioner, First National Bank Building, Vicksburg, Mississippi; Honorable James B. Ramsey, Attorney, First National Bank Building, Vicksburg, Mississippi, and Honorable Sam H. Long, Attorney, Tupelo, Mississippi.

This the 24th day of August, 1960.

C. R. Bolton,
Tupelo, Mississippi,
Attorney for Respondent.

APPENDIX A.

In the Supreme Court of Mississippi.

No. 41,341.

James O. Wallace

vs.

St. Louis-San Francisco Railway Company.

Kyle, Justice:

The appellant, James O. Wallace, sued the appellee, the St. Louis-San Francisco Railway Company, under the Federal Employers' Liability Act, for damages for personal injuries alleged to have been sustained by the appellant while engaged in the performance of his duties as an employee of the defendant on October 26, 1956.

The plaintiff alleged in his declaration that the defendant on that date was engaged in the furtherance of interstate commerce in the movement of freight by rail from the State of Mississippi to other states; that the plaintiff was employed as a brakeman on the defendant's railroad between Amory, Mississippi, and Memphis, Tennessee, and as such brakeman, was required to use certain paths on the defendant's railroad yards in Memphis, in going to and from his work; that, while plaintiff was using such pathway provided by the defendant in its yards, going to the washroom provided by the defendant to wash up, plaintiff found that the defendant had negligently allowed and permitted several of its freight trains or long strings of cars to remain standing on the railroad tracks in said yards, blocking the crossing and preventing the use by the defendant's employees of the pathway to go to said washroom; that the plaintiff found it necessary to cross over between said cars, and while

doing so slipped and fell by reason of the dangerous hazardous condition aforesaid, and permanently injured his back. The plaintiff alleged that the defendant was negligent in that it failed to exercise reasonable care to furnish the plaintiff with a safe place to work, which included incidental passage to and from the bathhouse provided for the use of the plaintiff and other employees; that the defendant violated its duty and its own rules of operation in negligently permitting the pathway provided by the defendant across its yards to become and remain blocked for a long period of time by trains or cuts of cars, thus preventing the proper and safe use of said passageway; and that the defendant's negligence in permitting said pathway to become and remain blocked was the proximate cause of plaintiff's slipping and falling.

The defendant in its answer denied that the plaintiff at the time of his injury was an employee of the defendant or was engaged in the furtherance of interstate commerce in the movement of freight by rail; and the defendant denied the other material allegations of the declaration. The defendant in its answer averred that the plaintiff was off duty and not in the service of the defendant at the time of the alleged accident. The defendant also averred that the plaintiff was guilty of gross negligence in climbing over or crossing through the alleged cut of box-car cars, and in selecting the way of returning from the Yale Hotel to the wash or locker rooms on the railroad yard, and that the gross negligence of the plaintiff was the direct and proximate cause of the plaintiff's injury.

The plaintiff testified that he lived in Amory, Mississippi, and had been an employee of the St. Louis-San Francisco Railway Company for a period of approximately 20 years. On October 26, 1956, he was on the posting as brakeman on a freight train which ran from Amory to Memphis, Tennessee, a distance of 96 miles. The conductor on the train was J. L. Duval;

also lived at Amory. The train left Amory at four o'clock A. M. and arrived at the Yale Yards in Memphis about 6½ hours later. The plaintiff and the conductor got off the train and went to the yard office, climbing over a cut of cars to get to the office. The members of the crew tied up the train and completed the active labor about 9:30 A. M. The plaintiff went immediately to the yard office and registered in the "time book" or register provided by the defendant, and reported his "tie up time." After the plaintiff had registered on the "time book" he left the office and went to the Yale Hotel, off the railroad yard on Trezevant Avenue, and registered for a room. There was a cinder path from the yard office to the street leading to the Yale Hotel which was used by the employees. When plaintiff left the yard office to go to the hotel this path was blocked by cuts of cars on three tracks and plaintiff climbed through three cuts of cars to reach the hotel, but this occurred without incident. After registering at the hotel for a room the plaintiff ate breakfast, sat down and read the morning paper, and finally walked outside to see if the cars that were blocking the walkway had been moved. About 12:15 P. M. the plaintiff decided to return to the washroom on the railroad yard to shave and check with the call boy as to when he might be used and also check the bulletin board. He climbed over the cut of cars on the south beyond the main line, on the No. 1 track, and was attempting to cross the cars on the No. 2 track, when he slipped and fell. There was no crossover of the cars when the plaintiff slipped and fell. The plaintiff then described in detail his injuries and the hospital and medical treatment which he had undergone as a result of his injuries.

On cross-examination, the plaintiff stated that he and the conductor signed out between 9:30 and 10:00 o'clock, and he had no further duties to perform in connection with the train. His next duties would be when he was

called to take another train. The plaintiff stated that when he signed the register at the yard office, he showed that he would be at the Yale Hotel. He was not supposed to be called back under eight hours. He was "on his own" until the call boy called him back; but he was supposed to be ready for another assignment on short notice.

J. L. Duval, who testified as a witness for the plaintiff, testified that after the trainmen signed the register at the end of a run they were free to go to their places of lodging, and were subject to no further duties until they were called. According to an agreement between the railroad and the Brotherhood, they would not be called prior to eight hours unless there was an emergency due to a wreck or a washout. After a trainman got off the yard he was "on his own", until notified by the call boy to report back to work. He must then have one hour and forty minutes notice. He was supposed to familiarize himself with the circulars and bulletins before the beginning of each trip. The rule required that he do that; but that was usually done just before the train pulled out. Duval stated that a trainman had no occasion for having to look at the bulletin board to see when he was going out, except for his own personal plans. A trainman was not required to go to the caller's office and look at the bulletin board to get his name on the list to be called.

At the close of plaintiff's case the defendant made a motion for a peremptory instruction on the ground that the plaintiff's evidence showed that the plaintiff was off duty at the time of the accident and had left the defendant's premises, and that the defendant was under no duty to furnish him a safe place to work because he had no work to do. The court sustained the motion and directed a verdict for the defendant, and judgment was entered thereon. From the judgment the plaintiff has prosecuted this appeal.

The Federal Employers' Liability Act, as amended by the Act of August 11, 1939, 45 U. S. C. A., Sec. 51 et seq., provides in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

It is fundamental that the interpretation of this act is a matter of federal law and that federal decisions are controlling. **Urie v. Thompson**, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282.

The first point argued by the appellant's attorneys as ground for reversal of the judgment of the lower court is that the court erred in sustaining the appellee's motion for a directed verdict and refusing to submit to the jury the question of whether or not the plaintiff was employed in interstate commerce at the time of the accident in question.

But we think there was no error in the court's refusal to submit to the jury the question of whether or not the

plaintiff was employed in interstate commerce at the time of his injury. There was no dispute as to any material fact; and we agree with the court below that the question for decision is one of law. **Quirk v. New York, C. & St. L. R. Co.** (C. C. A. 7th, 1951), 189 F. 2d 97. From the testimony of the plaintiff and the plaintiff's witness, J. L. Duval, it seems clear to us that the plaintiff's injury did not arise out of his interstate activities or the performance of any duties in furtherance of interstate commerce. The activity undertaken by the appellant, when he returned to the railroad yard at 12:15 P. M., was an activity undertaken for a purely private purpose. The appellant was performing at the time no duties as an employee "in furtherance of interstate or foreign commerce." He was engaged in no activity which, "in any way directly or closely and substantially," affected such commerce. He was performing no service for his employer. He was neither going to nor coming from the job at the time of his injury. He was neither engaged in rendering actual service to the railroad company, nor in doing the things necessarily incident thereto.

It is no longer doubted that the Employers' Liability Act extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto. Thus, an employee is working in commerce while going to and from his actual place of work after reporting for duty. **Lukon v. Pennsylvania R. Co.** (C. C. A. 3rd, 1942), 131 F. 2d 27. And, the act covers temporary departures from his line of course of duty, as where a fireman, after oiling, firing and preparing his engine for an interstate journey, temporarily left his engine to go to his nearby boarding house and was struck while on the railroad premises. **North Carolina R. R. Co. v. Zachary**, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. But, given its most liberal interpretation, the act cannot be extended to cover activities

not necessarily incident or of an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1934), 74 F. 2d 251; **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1935), 79 F. 2d 844; **Sassaman v. Pennsylvania R. Co.** (C. C. A. 3d 1944), 144 F. 2d 161; **Quirk v. New York, C. & St. L. R. Co.**, supra.

It is argued, however, on behalf of the appellant that, although the nature of the activity in which he was engaged at the time of his injury may have partaken of the character of a personal mission of his own, the activity was of such nature as might properly be deemed to have been incident to his duties in interstate commerce. But that argument is, in our opinion, wholly untenable, and finds no support in the authorities cited by the appellant's attorneys in their brief.

The appellant in this case, as in **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1934), 74 F. 2d 251, had ceased working two hours before the accident occurred, as a result of which he suffered his injury. His pay had ended. He had no further duties to perform until called to brake another train; and he was not supposed to be called again under eight hours, unless there was an emergency, that is to say, a wreck or a washout. The appellant, at the time of his injury, according to his own testimony, was returning to the railroad washroom to shave. As stated by the Court in the **Young** case, in commenting on the plaintiff's wish to go by Cedar Hill to change his clothes, "Certainly the defendant had no conceivable interest in this * * *." The opinion in the **Young** case was written by Judge Learned Hand; and in the later case of **Mostyn v. Delaware L. & W. R. Co.** (C. C. A. 2d 1947), 160 F. 2d 15, which was decided several years after the enactment of the 1939 amendment to the Federal Em-

ployers' Liability Act, Judge Hand said: "We hold, as we did in **Young v. New York, N. H. & H. R. Co.**, supra, that any activity undertaken by an employee for a private purpose is certainly not within his employment." See also **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1935), 79 F. 2d 844; **Quirk v. New York, C. & St. L. R. Co.**, supra; **Atchison, T. & S. F. R. Co. v. Wottle** (C. C. A. 10, 1952), 193 F. 2d 628.

This case is entirely unlike the case of **Atlantic Coast Line Railroad Co. v. Craven** (C. C. A. 4th 1950), 185 F. 2d 176, cited in the appellant's brief, in which the brakeman, having been led to believe that he was required to report to his conductor as soon as possible after putting the engine away at the completion of an interstate trip, left the railroad yard in an attempt to make such report and was injured while attempting to return to the railroad washroom. This case is also entirely unlike the cases of **Atlantic Coast Line R. R. Co. v. Meeks**, 1947, 30 Tenn. App. 520, 208 S. W. 2d 355; **Mostyn v. Delaware L. & W. R. Co.** (C. C. A. 2d 1947), 160 F. 2d 15; and **Casso v. Pennsylvania R. Co.** (C. C. A. 3rd 1955), 219 F. 2d 303, in which the injured employees were section hands or track workers housed in shanties or bunk cars furnished by the employers and subject to call when not actually in service.

A summary of the decisional law on the points presented for consideration by us on this appeal is stated by the textwriter in 35 Am. Jur., 861, Master and Servant, par. 445, as follows: "An employee whose regular service is a part of interstate commerce is within the protection of the Federal Employers' Liability Act while traveling on the company's property to begin his work, while awaiting the actual work time to begin after reaching the place to which he has been assigned, and while leaving the company's property on his way home, after his interstate work is completed. Also, if the work in which the employee is engaged is interstate commerce, he is pro-

tected while going from one job to another. In any case however, the work in which the employee was to engage must be shown to be interstate commerce; there can be no recovery if the employee was using the yards or tracks for purposes of his own, unless such use is so incidental to his employment that it can be regarded as a part thereof."

We think it is clear from the testimony of the appellant and his witness, J. L. Duval, that the appellant in this case was not acting within the scope of his employment at the time he received his injuries, and that the appellant's use of the railroad yards and tracks at that time was not so incidental to his employment that it can be regarded as a part thereof. We must therefore hold that the appellant was not employed in interstate commerce at that time, and that the appellant did not have a right of action under the Federal Employers' Liability Act at the time the suit was filed. Cf. **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1934), 74 F. 2d 251; **Young v. New York, N. H. & H. R. Co.** (C. C. A. 2d 1935), 79 F. 2d 844; **Bishop v. Delano** (C. C. A. 7th), 265 F. 263, certiorari denied, 254 U. S. 632, 41 S. Ct. 7, 65 L. Ed. 448; **Sassaman v. Pennsylvania R. Co.**, supra.

The judgment of the lower court is therefore affirmed.

Affirmed.

All Justices Concur Except Roberds, J., Who Took No Part.